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No. 79-488

IN THE

Supreme Court of the United States

October Term, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent,

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,

and

WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
Petitioners,

and

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and
WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
Petitioners,
and
LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

General Telephone Company of the Northwest, Inc. and its subsidiary, West Coast Telephone Company of California, Inc., petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The June 27, 1979 opinion of the court of appeals (App. A, *infra*) is reported in 599 F.2d 322 (9th Cir. 1979). The report and recommendation issued by the United States magistrate on November 11, 1977 (App. B, *infra*), affirmed by the district court (App. C, *infra*), is not officially reported, but is in 16 FEP Cases 476 (W.D. Wash. 1977).

JURISDICTION

The opinion of the court of appeals was filed June 27, 1979. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission must comply with the requirements of Rule 23 on class actions when it brings suit on behalf of a class under Section 706 of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended (42 U.S.C. §2000e-5).

STATUTES INVOLVED

Section 706 of Title VII, Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. § 2000e-5 (App. D, *infra*).

Rule 23 of the Federal Rules of Civil Procedure (App. E, *infra*).

STATEMENT

The plaintiff, Equal Employment Opportunity Commission (EEOC or Commission), filed suit in United States District Court, Western District of Washington, on April 11, 1977, against defendants General Telephone Company of the Northwest, Inc. and its subsidiary, West Coast Telephone Company of California, Inc. (hereinafter referred to collectively as GTNW), and defendant Local Union No. 89, International Brotherhood of Electrical Workers (Union or IBEW). The complaint stated that the action was "authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.* (Supp. II, 1972)." The complaint was precipitated by charges filed with the EEOC under Section 706 by four female employees of GTNW. The Commission, however, did not limit the relief it sought to the four charging parties. Instead the com-

plaint, as amended on August 1, 1977, alleged that GTNW discriminated against women throughout the company with regard to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions. The complaint sought broad relief, including damages, for all purported discriminatees affected by the allegations.

The EEOC did not allege in the original complaint or in the amended complaint that this was a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure. Furthermore, no action was taken to have the case certified as a class action in accordance with Rule 23. On August 15, 1977, however, the EEOC moved "the Court for an order bifurcating the issue of *class* liability from the issue of individual damages pursuant to Rule 42(b), Fed. R. Civ. Proc." (emphasis added). Also on August 15, 1977 pursuant to 42 U.S.C. §2000e-5(f)(5), the court ordered the action referred to a United States magistrate.

On September 16, 1977, GTNW filed a motion to dismiss the class action aspects of the case. The magistrate issued a Report and Recommendation on November 11, 1977, in which he concluded that the EEOC did not have to comply with Rule 23, rejecting the opposite conclusion of the Court of Appeals for the Fifth Circuit in *EEOC v. D. H. Holmes*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). The district court affirmed the magistrate's report but permitted an interlocutory appeal to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1292(b), which the court of appeals accepted.

The court of appeals, on June 27, 1979, through the district court judge sitting by designation, affirmed the district court conclusion that the EEOC did not have to com-

ply with Rule 23. It noted that there was no indication in 42 U.S.C. §2000e-5(f)(1) that the EEOC must qualify as a class representative when it sues on behalf of a class, but on the other hand observed that there was no provision in the statute or the Federal Rules of Civil Procedure exempting the Commission from the requirements of Rule 23. The court felt that the legislative history likewise failed to express clearly an intention that the EEOC either must comply with, or that it is exempted from, the class action certification requirement.

The court then commented that the EEOC is a public agency "charged with the vindication of public policy, not merely with the enforcement of private rights," 599 F.2d at 330, App. A at A-16, which petitioners had argued was a principle related to the Commission's "standing" to bring a broad-based action, but unrelated to the question as to the applicability of Rule 23. See note 3, *infra*. Although the court acknowledged that the Fifth Circuit in *D. H. Holmes* had previously concluded that when the EEOC brings a class action under § 706, it does so subject to Rule 23 just as the private litigant in whose place it stands, the Ninth Circuit disagreed that Rule 23 should apply to a § 706 action brought by the Commission. Declaring that the Attorney General does not need to comply with Rule 23 in a pattern and practice suit under § 707, the court of appeals agreed with the report of the magistrate that it should not apply a different rule with respect to § 706 actions "in view of the seemingly identical nature of the two sections." 599 F.2d at 331, App. A at A-18.

The court concluded that through the use of the broad equitable powers vested in the federal courts under §706(g), 42 U.S.C. § 2000e-5(g), courts could provide equitable

relief on a case-by-case basis to remedy the problems arising by not complying with Rule 23. The court then held that because compliance with Rule 23 by the EEOC was not expressly mandated by either Rule 23 itself or the 1972 amendments authorizing the EEOC to bring a civil suit under § 706, the petitioners' motion to dismiss the class action aspects of this suit would be denied.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Ninth Circuit in *EEOC v. General Telephone Company* is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *EEOC v. D. H. Holmes Company, Ltd., supra.* Thus, there is a split among the only two circuit courts of appeals to have decided the issue. Under U.S. Supreme Court Rule 19, 28 U.S.C., a court of appeals decision in conflict with the decision of another court of appeals on the same matter is one of the considerations noted by the Supreme Court in determining whether to review a judgment.

2. There is also a split among the approximately 20 district courts which have considered the issue,[1] as well

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1. District court decisions in which Rule 23 has been held to apply to §706 actions include: *EEOC v. Westinghouse Electric Corp.*, 20 FEP Cases 120 (M.D. N.C. 1979); *EEOC v. Delaware Trust Co.*, 18 FEP Cases 1521 (D. Del. 1979); *EEOC v. Page Eng'r Co.*, 17 FEP Cases 1638 (N.D. Ill. 1978); *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. 684 (N.D. Ohio 1978); *Niedhardt v. D. H. Holmes Co.*, 13 FEP Cases 449 (E.D. La. 1976), *aff'd, EEOC v. D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); and *EEOC v. Continental Oil Co.*, 393 F. Supp. 167 (D. Colo. 1975), *aff'd on other grounds*, 548 F.2d 884 (10th Cir. 1977). *See also EEOC v. Datapoint Corp.*, 12 FEP Cases 1133 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978).

District court decisions in which Rule 23 has been held not to apply to

[Footnote continued on page 6.]

as among the commentators who have addressed it.[2] This issue is a matter of nationwide importance which must be resolved because it affects the scope and procedure of every action brought by the EEOC on a class basis, which in turn are the majority of such actions brought by the EEOC. The issue is a preliminary matter which must be resolved initially and it affects the subsequent course of each case in discovery, settlement, damages and otherwise. Since the courts of appeals for the two largest circuits have split on the issue, until the matter is resolved there will be confusion in the majority of trial courts faced with the problem. The split in the district courts and the courts of appeals on this important question of federal law makes it essential that the United States Supreme Court settle the issue now.

There are additional reasons for reversing the decision. If the court of appeals decision is not reversed, it will enable the EEOC to seek class type relief without fullfilling the precise requirements of the class action rule, and it will greatly expand the scope of these actions and the attend-

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§706 actions include: *EEOC v. Bumble Bee Seafoods,* 19 EPD ¶9160 (D. Ore. 1979); *EEOC v. Stroh Brewery,* 19 EPD ¶9226, 19 FEP Cases 1099 (E.D. Mich. 1979); *EEOC v. Singer Controls Co. of America,* 18 FEP Cases 309 (N.D. Ohio 1978); *EEOC v. Raymond Metal Prods. Co.,* 17 FEP Cases 206 (D. Md. 1978); *EEOC v. Schlueter Mfg. Co.,* 17 FEP Cases 53 (E.D. Mo. 1978); *EEOC v. Whirlpool Corp.,* 16 FEP Cases 932 (N.D. Ind. 1978); *EEOC v. General Tel. Co.,* 16 FEP Cases 476 (W.D. Wash. 1977); *EEOC v. Pinkerton's Inc.,* 14 FEP Cases 1431 (W.D. Pa. 1977); *EEOC v. CTS,* 13 FEP Cases 852 (W.D. N.C. 1976); *EEOC v. Vinnell-Dravo-Lockheed-Manning,* 417 F. Supp. 575 (E.D. Wash. 1976); *Stuart v. Hewlett-Packard Co.,* 66 F.R.D. 73 (E.D. Mich. 1975); and *EEOC v. Lutheran Hosp.,* 10 FEP Cases 1177 (E.D. Mo. 1974).

2. Compare Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission,* 29 Case W. Res. L. Rev. 343 (1979), *with* Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co.,* 28 Syracuse L. Rev. 741 (1977).

ant discovery without the appropriate guidelines of Rule 23. Further development of the reasons for reversal of the Ninth Circuit decision are highlighted below and are developed more fully in the briefs of petitioners and *amicus curiae* below, the Fifth Circuit decision noted and in Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission,* 29 Case W. Res. L. Rev. 343 (1979).

3. Neither the Civil Rights Act of 1964, as amended, nor the Federal Rules of Civil Procedure exempt the EEOC from compliance with Rule 23. A reading of Rule 1, Rule 81, and interpretative case law of these two Federal Rules of Civil Procedure, clearly indicates that agencies of the United States, unless exempted by Rule 81 or by other subsequently enacted or amended federal statutes, are to comply with the federal rules. See *United States v. Procter & Gamble,* 356 U.S. 677, 681, 78 S. Ct. 983, 21 L. Ed. 2d 1077 (1958). While Congress does have the statutory power to supersede the federal rules, unless Congress clearly expresses an intent to do so, subsequently enacted statutes are to be construed to harmonize with the federal rules. *United States v. Gustin-Bacon Division,* 426 F.2d 539 (10th Cir. 1970), *cert. denied,* 400 U.S. 832 (1970). A departure from the federal rules, especially the complete abrogation of an important rule as to an entire class of lawsuits, is not lightly to be inferred from an Act of Congress which does not explicitly amend the federal rules nor even mention Rule 23. If the Ninth Circuit decision is not reversed, one suggestion will be that the EEOC can selectively choose those federal rules with which it will comply since Title VII does not state it is

bound by any of them, which petitioners' maintain is incorrect.

It is undisputed that §706 does not clearly exempt the EEOC from compliance with either the federal rules in general or Rule 23 in particular. On the contrary, the legislative history demonstrates that Congress was aware of the class action nature of §706 actions when it conferred standing on the EEOC to bring such actions and Congress contemplated that Rule 23 would apply whether the suit was brought by private individuals or by the EEOC on their behalf, as occurred herein.[3]

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3. Senator Javits, one of the floor managers of the 1972 legislation and the ranking minority member of the committee which reported it, pointed out to the Senate that it was by virtue of Rule 23 that EEOC would have authority to secure class relief when suing under §706. He explained that if the EEOC "can sue for an individual claimant, then they can sue for a group of claimants", since "this is provided for by the rules of civil procedures in the Federal courts." SENATE COMM. ON LABOR & PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1589 (1972). Senator Javits went on to state: "I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled 'Class Actions' and which give the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party." *Id.* at 1590.

It is important to distinguish the concept of standing to sue from the requirement of complying with the certification requirements of Rule 23. Congress has clearly given the EEOC standing to sue under §706 on a broad basis for all matters discovered during the investigation, even if the individuals who brought the initial charge could not sue because they lacked standing to bring suit for discrimination not involving them. This does not, however, decide the applicability of Rule 23 to EEOC class actions where the rationale differs considerably. The characterization of the EEOC as standing in the shoes of the individual claimants when it brings suit under §706 was discussed in depth by Chief Justice Berger and Justice Rehnquist in their dissent in *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 380, 97 S. Ct. 2447, 2462, 53 L. Ed. 402, 421 (1977). The majority opinion did not address the dissent's characterization of the role of the EEOC in §706 suits, but neither did it dispute the dissent's analysis. If this latter analysis is correct, as petitioner contends, it further supports the conclusion of the applicability of Rule 23 to §706 actions by the EEOC, which have been precipitated by individual charging parties.

4. Although the Court of Appeals for the Ninth Circuit saw no reason to draw a distinction between §707 pattern and practice suits and §706 actions with respect to the applicability of Rule 23, whether the EEOC must comply with Rule 23 in proceedings initiated under §707 of Title VII does not decide whether it must comply with Rule 23 in proceedings initiated under §706.[4]

The court of appeals failed to recognize that the differences between these two sections are controlling, not their similarities. Only the EEOC may institute §707 cases against nongovernmental employers, a power it inherited from the Attorney General in 1972, and this power is in no way dependent upon the existence of a particular private charge filed with the Commission. No private right of action exists under that section; the private party seeking redress against discrimination may sue only under §706.[5] Similarly, a violation of §706 does not necessarily establish that §707 has also been violated. Due to the fact a subsequent private §707 suit is not possible, less purpose is served by application of Rule 23 to the EEOC in a §707 case. It does not follow, however, that where the EEOC proceeds under §706, a defendant should be required to defend the same charge of discrimination involving the same class of employees in a multiplicity of actions solely because the EEOC, rather than a private class representative, is the named plaintiff. The application of Rule 23 provides the solution by consolidating the

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4. The Attorney General has not yet been required by any court to comply with Rule 23 in a pattern and practice suit under §707, although the question remains as to whether *this* Court would reach the same decision on the applicability of Rule 23 to §707. *See,* Bumpass, *supra* note 2, at 390-394.

5. *See, e.g., United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

multiplicity of claims into a single action and achieving finality as to those claims.

5. EEOC compliance with Rule 23 will promote Congress' aim in achieving finality of litigation and avoiding unnecessary duplication of proceedings. The claims of class member employees would be adequately resolved in one proceeding, without subjecting employers to the potential of future time consuming, expensive litigation and numerous individual actions. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969). This result is fully consistent with the scheme of Title VII as amended in 1972. Any other result would be contrary both to Rule 23 and to the public policies embodied in that rule. Additionally, the certainty of a final and binding judicial decision emanating from a §706 class suit entered into by the EEOC enhances the possibility of pre-trial settlement of litigation. Absent the application of Rule 23, settlement of an EEOC action is not binding upon individual employees who are then free to bring their own subsequent actions against the defendant employer. *See, EEOC v. Datapoint Corp.*, 412 F. Supp. 406 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978). Such risks and the resulting chilling effect upon settlement efforts can be avoided when the provisions of Rule 23 are applied and the settlement agreement that is entered into is binding upon all members of the class.

To the extent needed, Rule 23 itself permits flexibility. District courts, in an appropriate case, may choose the option of Rule 23(b)(3) and permit class members to opt out if, after receiving notice of litigation, they are dissatisfied with the EEOC as class representative or for any reason prefer not to be bound. This procedure was followed in *EEOC v. Data Point Corp.*, 570 F.2d 1264 (5th Cir. 1978). There is no need, and in fact this approach should be discouraged, for resolving through equitable relief, case-by-case, the problems which arise in such broad class actions if Rule 23 is not applied.

CONCLUSION

In the absence of a clear legislative mandate, a court should not depart from the uniform application of procedural rules governing suits under §706 merely because the EEOC, rather than a private litigant, pursues claims for relief. In any event, the confusion created by the split in the circuit courts of appeal and the district courts should be resolved and the petition for a writ of certiorari should be granted.

DATED this 19th day of September, 1979.

Respectfully submitted,

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APPENDIX A

599 FEDERAL REPORTER, 2d SERIES, 322

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and West Coast Telephone Company of California, Inc.,
Defendants-Appellants,

Local Union No. 89,
International Brotherhood of Electrical Workers,
Defendant.

No. 78-1849

United States Court of Appeals, Ninth Circuit.
June 27, 1979.

Equal Employment Opportunity Commission brought suit against company, subsidiary company and union alleging discrimination against women employees with respect to maternity leave, access to craft jobs and opportunities for promotion to managerial positions. The United States District Court for the Western District of Washington, Walter T. McGovern, Chief Judge, adopted recommendation of magistrate and entered order denying company's motion to dismiss class action aspects of case, and company appealed. The Court of Appeals, Jameson, District Judge, sitting by designation, held that: (1) compliance with rule of civil procedure governing class actions was not expressly mandated either by rule itself or 1972 amendments to Title VII of Civil Rights Act authorizing Commission to bring suit to prevent unlawful employment practices, and (2) trial court could fashion appropriate orders to insure that defendants were not subjected to double payment or unnecessarily duplicative litigation in that court, under its broad equitable powers, could prescribe procedures and remedies which were fair and equitable to all parties.

Affirmed.

1. Civil Rights § 9.10

Title VII of the Civil Rights Act of 1964 was enacted to assure equality of employment opportunities by eliminating practices and devices which discriminate on basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

2. Civil Rights § 31, 37

Equal Employment Opportunity Commission does not have authority to adjudicate claims or impose sanctions: final responsibility for enforcement of Title VII is vested with federal courts. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

3. Civil Rights § 41, 46

If Equal Employment Opportunity Commission is unable to secure acceptable conciliation agreement, Commission is authorized to bring civil action against any respondent which is not a governmental entity, and in such action court may grant injunctive relief and order appropriate affirmative action. Civil Rights Act of 1964, § 706(e)(1) as amended 42 U.S.C.A. § 2000e-5(f)(1).

4. Civil Rights § 47

Justice Department has authority to bring suit against governmental entity which engages in unlawful discrimination. Civil Rights Act of 1964, § 707 as amended 42 U.S.C.A. § 2000e-6.

5. Civil Rights § 47

1972 amendments to Title VII of Civil Rights Act of 1964 were intended to increase enforcement power of Equal Employment Opportunity Commission by authorizing Commission to bring civil suit. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure § 161

For proper maintenance of class action, court must find not only that all of prerequisites to class action are met but also that suit satisfies standards for at least one of three types of class suits enumerated in subdivision of rule governing when class actions are maintainable. Fed.Rules Civ. Proc. rules 23(a, b), 28 U.S.C.A.

7. Federal Civil Procedure § 161

In determining whether action may properly be brought under rule governing class actions, court must first find that class exists and that named representative is a member of a class which he purports to represent. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

8. Federal Civil Procedure § 184

Every action under Title VII of Civil Rights Act is in effect a class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

9. Federal Civil Procedure § 161

Litigant must be member of class which he seeks to represent at time class action is certified by district court. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

10. Federal Civil Procedure § 164

If party has himself suffered injury, statute may permit him to sue on behalf of third parties or to assert a public interest.

11. Federal Civil Procedure § 164

Class actions by a governmental entity are appropriate under certain circumstances if the entity is able to satisfy the prerequisites of rule governing class action; however, merely being governmental representative does not entitle one to relief as member of the class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

12. Civil Rights § 47

Title VII explicitly grants Equal Employment Opportunity Commission authority to assert rights of others which may have been impaired by activities in question; thus, Commission has standing to sue. Civil Rights Act of 1964, § 706(e)(1) as amended 42 U.S.C.A. § 2000e-5(f)(1).

13. Statutes § 184

Starting point in every case involving construction of statute is the language itself.

14. Federal Civil Procedure § 184

Legislative history of statute authorizing Equal Employment Opportunity Commission to bring civil suit failed to express clear intention as to whether Commission was required to comply with or was exempt from class action certification requirement. Fed.Rules Civ.Proc. rules 23, 81, 28 U.S.C.A.; Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e-5.

15. Civil Rights § 47

If government alleges systemwide pattern or practice of resistance to full enjoyment of Title VII rights, government must prove more than mere occurrence of isolated or accidental or sporadic discriminatory acts; government must establish by preponderence of evidence that discrimination was the company's standard operating procedure, the regular rather than the unusual practice. Civil Rights Act of 1964, § 707 as amended 42 U.S.C.A. § 2000e-6.

16. Civil Rights § 47

Where government alleges pattern or practice of resistance to full enjoyment of Title VII rights, government is not required at the initial liability stage to offer evidence that each person for whom it will ultimately seek relief was the victim of the employer's discriminatory policy; rather, its burden is to show that such a policy existed. Civil Rights Act of 1964, § 707 as amended 42 U.S.C.A. § 2000e-6.

17. Federal Civil Procedure § 184

Although there may be differences in the nature and burden of proof in Equal Employment Opportunity Commission actions under section of Title VII governing power of Commission to prevent unlawful employment practices and pattern and practice suits under section governing civil actions by Attorney General, action under either section seeks to vindicate public policy and individual relief may be granted under either section for victims of discriminatory practices; thus, no distinction should be drawn between actions under either section with respect to applicability of rule governing class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964, §§ 706, 707 as amended 42 U.S.C.A. §§ 2000e-5, 2000e-6.

18. Federal Civil Procedure § 184

Compliance with rule governing class actions not expressly mandated for action by Equal Employment Opportunity Commission seeking relief from discriminatory practices affecting class of individuals either by rule governing class actions or amendments to Title VII authorizing Commission to bring civil action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964 § 706 as amended 42 U.S.C.A. § 2000e-5.

19. Federal Civil Procedure § 184

Procedures of rule governing class actions applicable to private litigant in class action to prevent unlawful employment practices are available to courts in action by Equal Employment Opportunity Commission under broad equitable powers vested in the courts. Fed.Rules Civ.Proc. rules 23, 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, §§ 706, 706(g) as amended 42 U.S.C.A. §§ 2000e-5, 2000e-5(g).

20. Federal Civil Procedure § 184

Even if action by Equal Employment Opportunity Commission to prevent unlawful employment practices contains request for back pay, case continues to be properly certifiable under provision of rule allowing class action to be maintained if party opposing class has acted or refused to act on grounds generally applicable to the class. Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.; Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e-5.

21. Constitutional Law § 309(1.5)
Federal Civil Procedure § 161

Where action is certified under provision of rule allowing class action to be maintainable if party opposing class has acted or refused to act on grounds generally applicable to the class, absent class members are not required to receive notice or to have opportunity to opt out of the suit; due process requires only that class members be adequately represented. Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.; U.S.C.A. Const. Amend. 5.

22. Federal Civil Procedure § 161

In class action certified under provision of rule providing class action is maintainable if party opposing class has acted or refused to act on grounds generally applicable to the class, court in its discretion may direct that notice be given to members of class. Fed.Rules Civ.Proc. rule 23 (b)(2), (d), 28 U.S.C.A.

23. Federal Civil Procedure § 161

Trial court need not require notice or allow absent members of class to opt out if Equal Employment Opportunity Commission sues in class action to prevent unlawful employment practices; however, equitable powers of court may be exercised to require notice to class members. Fed. Rules Civ.Proc. rules 23, 23(d), 28 U.S.C.A.; Civil Rights Act of 1964, §§ 706, 706(g) as amended 42 U.S.C.A. §§ 2000e-5, 2000e-5(g).

24. Civil Rights § 46

Broad equitable powers are vested in federal courts under provision of Title VII governing power of Equal Employment Opportunity Commission to prevent unlawful employment practices, and courts are empowered to fashion such relief as particular circumstances of case may require. Civil Rights Act of 1964, § 706(g) as amended 42 U.S.C.A. § 2000e-5(g).

25. Equity § 39(1)

It is historic purpose of equity to secure complete justice, and courts will be alert to adjust the remedies so as to grant the necessary relief.

26. Civil Rights § 47

In class action by Equal Employment Opportunity Commission to prevent unlawful employment practices, court may fashion appropriate orders to insure that defendants are not subjected to double payment or unnecessarily duplicative litigation. Civil Rights Act of 1964, § 706(g) as amended 42 U.S.C.A. § 2000e-5(g).

James R. Dickens (argued), of Karr, Tuttle, Koch, Campbell, Mawer & Morrow, Seattle, Wash., for defendants-appellants.

Vincent J. Blackwood, Atty. (argued), Abner W. Sibal, Charles L. Reischel, Joseph T. Eddins, Jr., E.E.O.C., Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before GOODWIN and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

This interlocutory appeal presents the question of whether the Equal Employment Opportunity Commission (EEOC) has authority under § 706(f)(1) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(f)(1) (Supp. V. 1975), to seek relief from discriminatory practices affecting a class of individuals without complying with the class certification requirements of Rule 23, F.R. Civ.P.

Plaintiff-appellee, EEOC, brought suit against the defendants-appellants, General Telephone Company of the Northwest, Inc., its subsidiary, West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers (collectively called General Telephone), alleging that General Telephone discriminated against women employees with respect to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions. EEOC sought injunctive relief and back pay for individuals affected by the challenged practices.[1]

EEOC moved "the Court for an order bifurcating the issue of class liability from the issue of individual damages pursuant to Rule 42(b), F.R.Civ.P.". On the same day the

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*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

1. It appears from answers to interrogatories that four employees of General Telephone had filed sex discrimination charges with EEOC. After investigation the Commission found reasonable cause to believe that General Telephone and the other defendants were discriminating against female employees. The EEOC identified as presumptively aggrieved by General Telephone's failure to consider women equally "all female employees, female applicants for employment and women who would have applied but for the alleged unlawful discrimination".

district court referred the action to a magistrate for trial. General Telephone filed a motion to "dismiss the class action aspects of plaintiff's complaint."

The magistrate issued a "Report and Recommendation" to the district court, recommending that General Telephone's motion to dismiss be denied. He concluded that the EEOC is not required to comply with Rule 23 for three reasons: (1) the EEOC is not required to comply with Rule 23 in § 707 (42 U.S.C. § 2000e-6) "pattern and practice" suits, and suits under § 706 (42 U.S.C. § 2000e-5) should not be treated differently; (2) the statute itself provides the necessary authority for the EEOC to bring suit on behalf of a class; and (3) it is undesirable and impractical to require the EEOC to comply with Rule 23.

The district court adopted the magistrate's recommendation and entered an order denying General Telephone's motion to dismiss the class action aspects of the case. The order was later amended to certify the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and this court entered an order granting permission to appeal. On appeal General Telephone contends that Rule 23 applies to class actions brought by the EEOC under § 706 of Title VII, since neither the Civil Rights Act of 1964 nor the Federal Rules exempt the EEOC from compliance with Rule 23.

The Civil Rights Act as Amended

[1] Congress enacted Title VII of the Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). "Cooperation and voluntary compliance were selected as the preferred means for achieving the goal." To that end the EEOC was created and a procedure established whereby "state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1973).

[2-4] Title VII of the Civil Rights Act was amended in 1972. The amendments expanded the enforcement authority of the EEOC.[2] Under the 1972 amendment the Commision is empowered to "prevent any person from engaging in any unlawful employment practice." § 706(a), 42 U.S.C. § 2000e-5(a). If the Commission is unable to secure an acceptable conciliation agreement, the Commission is authorized to bring a civil action against any respondent which is not a governmental entity. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).[3] In such an action the court may grant injunctive relief and order appropriate affirmative action. Under the amendment the Commission also has "authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." § 707(e), 42 U.S.C. § 2000e-6(e).[4]

[5] It is clear from the legislative history that the 1972 amendments were intended to increase the enforcement power of the EEOC by authorizing the Commission to bring civil suits. The Senate Labor Committee Report noted that the burden of suits by disadvantaged individuals had effectively precluded recovery in valid claims, and the amendment was an effort to end what had been described as a "modern day David and Goliath confrontation". The purpose of Title VII was to be accomplished "through a system of administrative hearings, Commision decisions and orders, and ultimate court review in appropriate cases —the method which has long been utilized by other regulatory agencies". Senate Labor Committee Report, reprinted in "The Equal Employment Opportunity Act of 1972", Bureau of National Affairs, Inc. (hereinafter BNA) at 241.

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2. The Commission does not, however, have authority to adjudicate claims or impose sanctions. Final responsibility for enforcement of Title VII is vested with federal courts. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 44, 94 S.Ct. 1011.

3. The Justice Department is given the authority to bring suit against a governmental entity which engages in unlawful discrimination. 42 U.S.C. § 2000e-6.

4. Under the original act Title VII gave individuals the right to bring suits. § 707 gave the Attorney General the authority to bring "pattern and practice" suits. The authority of the EEOC was limited to investigation and conciliation.

A private right of action was retained, but it was "hoped that recourse to the private law suit [would] be the exception and not the rule, and that the vast majority of complaints [would] be handled through the offices of the EEOC or Attorney General as appropriate". Section-by-Section Analysis, Congressional Record, March 6, 1972, BNA at 130 (analysis of § 706(f)(1)).

Class Actions Under Rule 23

Rule 1 of the Federal Rules of Civil Procedure states that the federal rules "govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81".[5] The rules "shall be construed to secure the just, speedy, and inexpensive determination of every action".

[6] Rule 23(a) provides that, "One or more members of a class may sue or be sued as representative parties on behalf of all," only if the prerequisites therein specified are met.[6] For the proper maintenance of a class action the court must find not only that all of the prerequisites of subdivision (a) are met, but also that the suit satisfies the standards for at least one of the three types of class suits enumerated in subdivision (b). 3B Moore's Federal Practice, § 23.03, at 23-109.

[7] In determining whether an action may properly be brought under Rule 23, a court must first find (1) that a class exists, and (2) that the named representative is a member of the class he purports to represent. See Wright and Miller, Federal Practice and Procedure: Civil Class Actions, §§ 1760 and 1761; 3B Moore's Federal Practice, §§ 23.04[1] and [2].

[8] The first prerequisite, existence of a class, presents no problem. Every action under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, is in effect a class action.

5. Rule 81 does not contain an exemption for suits brought by the EEOC under Title VII.

6. The prerequisites are that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class". Rule 23(a).

Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 1333 (9 Cir. 1977) and cases cited therein.

[9] The second prerequisite, membership in the class, "is inherent in the real party in interest requirement prescribed by Rule 17(a) and is reinforced by the statement in Rule 23(a) that 'one or more members of a class may sue or be sued as representative parties . . .' ". Wright and Miller, *supra,* § 1761. The "member of the class" requirement has been strictly applied when a private party seeks to be named as a class representative. See *Warth v. Selden,* 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sosna v. Iowa,* 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *DuPree v. United States,* 559 F.2d 1151, 1153 (9 Cir. 1977).[7]

[10, 11] On the other hand, if a party has himself suffered an injury, a statute may permit him to sue on behalf of third parties or assert a "public interest". *Sierra Club v. Morton,* 405 U.S. 727, 737-38, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and cases there cited. Class actions by a governmental entity are appropriate under certain circumstances, if it is able to satisfy the prerequisite of Rule 23. *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 266, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). But merely being a governmental representative will not entitle one to qualify as a member of the class. *DuPree v. United States,* 559 F.2d at 1154.

[12] Title VII gives the EEOC the standing to sue. The statute explicitly grants the EEOC the authority to assert the rights of others which may have been impaired by the activities in question. See *DuPree v. United States,* 559 F.2d at 1154. The legislative history makes it clear that the EEOC is a "properly suing party".

Based solely upon the language of Rule 23, it can be argued that the Rule does not apply to actions brought by the EEOC to enforce Title VII rights. The EEOC obviously is not a member of the "class" it represents. It does not satisfy the requirement of Rule 23(a)(3) that the "claims

7. As the Court said in *Sosna v. Iowa,* "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." 419 U.S. at 403, 95 S.Ct. at 559.

or defenses of the representative parties" be "typical of the claims or defenses of the class". While individuals affected by an EEOC action may receive specific kinds of relief, the objective of the EEOC is to vindicate the public interest. Moreover, while class action certification requires a judicial determination that the named plaintiffs will adequately represent the class, Congress has already made the determination that the EEOC is an adequate representative of victims of employment discrimination.[8]

Use of the Class Action under Title VII
Statutory Construction

[13] Logic and precedent dictate that "the starting point in every case involving the construction of a statute is the language itself". *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239 (1978) quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). The statute, 42 U.S.C. § 2000e-5(f)(1), states only that "the Commission may bring a civil action". There is no indication in the statute itself that the Commission must qualify as a class representative when it sues on behalf of a class. Nor is there any provision in either 42 U.S.C. § 2000e-5 or the Federal Rules of Civil Procedure, Rule 81, explicitly exempting the Commission from the Rule 23 requirement.

[14] The legislative history likewise fails to express clearly an intention that the EEOC comply with or be exempted from the class action certification requirement.[9]

8. See Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co.*, 28 Syracuse Law Review 741, 746 (1977).

9. In *EEOC v. D. H. Holmes Co., Ltd.*, 556 F.2d 787, 794 (5 Cir. 1977), *cert. denied* 436 U.S. 962, 98 S.Ct. 3082, 57 L.Ed.2d 1129, the court found "[n]othing in the statutory language or legislative history of Title VII . . . (to) supports the position EEOC advances regarding an action *outside* Rule 23". Professor Reiter found the legislative history to be "more ambiguous than the court was willing to recognize" in *Holmes*. Recognizing that language in the legislative history "may support the position adopted by the Fifth Circuit in *Holmes*, it is probably more accurate to state that such language is inconclusive on the matter and that in reality Congress did not consider whether the Commission was bound to comply with Rule 23". Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co., supra* at 753-754.

Most of the comments with reference to the use of class actions concerned their use by private litigants who before the 1972 amendments were the only parties who could sue on a charge of employment discrimination. Congress expressed its approval of the liberal manner in which the class action requirements had been applied and stated that the 1972 amendment was not intended to "affect the *present use* of class actions lawsuits under Title VII in conjunction with Rule 23".[10]

The Section-by-Section Analysis of § 706 printed in the Congressional Record establishes that (1) under the 1972 amendments legal action by the EEOC is preferred to that by private litigants,[11] and (2) when a private litigant brings a class action suit, the liberal application of the Rule 23 requirement by the courts is the appropriate treatment. See n. 10 *supra*. There is no discussion of class action procedure when the EEOC sues on behalf of a class.[12]

In Congressional debate on other provisions in the 1972 amendments, collateral reference is made to the authority

10. "In establishing the enforcement provisions under this subsection and subsection 706(f) generally (allowing the EEOC the right to sue as well as retaining the private litigant's right to sue), it is not intended that any provisions contained therein shall affect the *present use* of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that the claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief." Section-by-Section Analysis, BNA at 131. (emphasis added)

11. "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief." Section-by-Section Analysis, BNA at 131.

12. The "present use" of class action (see n. 10) suits involved use by private litigants on behalf of a class. A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee. Conference Committee Report, BNA at 122, U.S. Code Cong. & Admin.News, pp. 2137, 2179, 2183 (1972).

granted to the EEOC to sue and the use of class actions. These statements must be considered in their proper context in determining Congressional intent as to the use of the class action. Most of the remarks were made in debate over the authority of the EEOC under § 707 of the Act, the section which authorized the EEOC to bring suit to curtail a pattern or practice of employment discrimination, a power that had previously been vested in the Department of Justice alone. Senator Hruska offered an amendment which would have retained the authority to bring pattern and practice suits in the Department of Justice.[13] Senators Williams and Javits, floor managers of the Senate bill, spoke against the proposed amendment. The substance of their argument was that the authority granted to the EEOC under § 706 to allow it to seek court enforcement, rather than limiting its power to issuance of cease and desist orders as had been suggested at one point, was very broad and included the power to bring a pattern and practice type suit.[14] They argued against placing such broad power in both the Department of Justice and the EEOC.

The only remarks in the Congressional debate which might tend to show that Congress intended the EEOC to comply with the provisions of Rule 23 are those of Senator Javits in arguing against the amendment which would have

13. Senator Hruska said in part:

> Section 706 . . . is a complaint-oriented procedure and is not geared to the management of pattern and practice suits which are in the nature of class action suits.
>
> It seems to me that the manager of this bill would be well advised to eliminate that Section (power to EEOC under § 707 to enforce pattern and practice suits), because it is wrong to put into the Commission's authority the prosecution of what amounts to class actions.
>
> 118 Cong.Rec. 4080 (1972), BNA at 360.

14. In responding to Senator Hruska, Senator Williams said in part:

> There will be no difference between the cases that the Attorney General can bring under section 707 as a "pattern and practice" charge and those which the Commission will be able to bring as a result of yesterday's decision to give EEOC court enforcement powers. Frankly, the pattern and practice section becomes a redundancy in law.
>
> 118 Cong.Rec. 4081 (1972), BNA at 361.

limited the EEOC's power.[15] He indicated that the EEOC has broad authority to sue on behalf of a group of claimants under § 706 just as the Department of Justice had done in "pattern and practice suits". With specific reference to Rule 23 he noted that this Rule, "entitled Class Actions", gives "the opportunity to engage in the Federal Court in class actions by properly suing parties". He continued: "We ourselves have given permission to the EEOC to be a properly suing party."

While Senator Javits' remarks might be interpreted to signify the necessity of complying with Rule 23, they may also be interpreted to show the breadth of suit which the EEOC would be entitled to bring, rather than indicating that the EEOC would be subject to the procedural requirements of the Rule in bringing a class action.[16] In fact, his

15. Senator Javits in opposing Senator Hruska's proposed amendment said in part:

> By our decision yesterday (granting the EEOC authority to bring court suits) we gave the EEOC the power to bring suit in big as well as small cases . . .
>
> These are essentially class actions and if (the Commission) can sue for an individual claimant, then they can sue for a group of claimants.
>
> It seems to me that this is provided for in the Rules of Civil Procedure in the Federal Courts, and also is inherent in the amendment which we adopted. Under these circumstances it seems to me that this amendment is conclusively dealt with, and whatever may have been the argument which might have obtained in respect to cease and desist orders and the desire to retain this jurisdiction in the Department of Justice when the Commission was going to proceed by cease and desist orders, rather than by suit, has now given way to the fact that the Commission can only proceed by suit. And if it proceeds by suit then it can proceed by class suit. If it proceeds by class suit it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.
>
> I have referred to the rules of civil procedure. I now refer to Rule 23 of those rules, which is entitled Class Actions and which give the opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party . . .
>
> 118 Cong. Rec. 4082 (1972), BNA at 361-362.

16. Professor Reiter commented: "However, the remarks of Senator Javits are not as conclusive as they might first appear to be. His comments were not made for the purpose of showing that the Commission is bound to follow rule 23 whenever it sues on behalf of a group of persons, but instead were made to show the breadth of a suit which may be brought under either Section 706 or Section 707." Reiter, *The Applicability of Rule 23 in EEOC Suits: An Examination of EEOC v. D. H. Holmes Co., supra* at 753 n. 72.

concluding remarks quite clearly suggest that Senator Javits was simply stating that Congress itself had made the determination of the propriety of a class action which a court must make under Rule 23. We are not persuaded that Senator Javits' remarks manifest a Congressional intent that an action by the EEOC requires a compliance with Rule 23.

Public Policy of EEOC Actions

This court has held that the EEOC is a public agency "charged with the vindication of public policy, not merely with the enforcement of private rights". *EEOC v. Occidental Life Insurance Co., of California*, 535 F.2d 533, 542 (9 Cir. 1976) *aff'd* 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977). In *Occidental* the court was concerned, *inter alia*, with the application of a state statute of limitations in an EEOC suit under § 706. We recognized the well established rule that "in a *private* civil rights action," where Congress has not provided a statute of limitations, the state statute applicable to similar litigation will be applied; but we concluded that the EEOC in seeking injunctive relief, as well as back pay, "promotes *public* policy and seeks to vindicate rights belonging to the United States as sovereign". *Id.* at 537.[17] We held further that the fact that private parties may benefit from the public "action does not detract from the public nature of [the] proceedings", *Id.* at 539, and that "[the] enforcement by the EEOC of the objectives of Title VII should not be frustrated because a private charging party may not have had

17. Appellants rely heavily on the dissenting opinion in the Supreme Court, which concluded that EEOC suits under § 706 were actions primarily designed to redress injuries suffered by individual claimants and rejected the holding of this court that because the EEOC promotes public policy by its prayer for injunctive relief, it therefore "seeks to vindicate rights belonging to the United States as sovereign". It is true, as appellants contend, that the majority opinion did not expressly address the dissent's characterization of the role of the EEOC in § 706 suits, but it did hold that "it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies". 432 U.S. at 367, 97 S.Ct. at 2455. The Court in the majority opinion clearly recognizes a distinction between actions instituted by the EEOC and private class actions by complaints.

'standing' to make a particular claim". *Id.* at 542.[18] Other courts have also recognized that the standing of the EEOC to sue in a § 706 action is not controlled or determined by the standing of the charging party to sue. See, *e.g.*, *EEOC v. General Electric Co.*, 532 F.2d 359, 373 (4 Cir. 1976).

In concluding that the EEOC was required to comply with Rule 23 in a § 706 action, the court in *EEOC v. D. H. Holmes Co., Ltd.*, 556 F.2d at 794,[19] said in part:

> [Section 706] gives EEOC standing to sue under Title VII to the same extent as individuals aggrieved by discrimination in employment. Logically it follows, then, that when EEOC brings a class action suit under § 706, 42 U.S.C. 2000e-5(f)(1) (as an individual aggrieved may do), it does so subject to Rule 23 just as the private litigant in whose place it stands.

In other words, the court in *Holmes* did not recognize the distinction between a private class action by aggrieved individuals and an action by the EEOC "seeking vindica-

18. See also *EEOC v. Hearst Corp., Seattle Post-Intelligencer*, 553 F.2d 579 (9 Cir. 1976), where this court again recognized that "EEOC is a public agency seeking vindication of public rights" and that a "narrower rule" would be applicable in private actions seeking judicial relief for incidents not listed in an original EEOC charge.

19. Both parties recognize that *Holmes* is the only case decided by a circuit court which has addressed the precise issue presented in this case. The Fifth Circuit reaffirmed its holding in *Holmes* in *EEOC v. Datapoint Corp.*, 570 F.2d 1264, 1268 (1978). District courts have held both ways, for a variety of reasons. Cases holding that the EEOC must comply with Rule 23, under § 706 or § 707, include *EEOC v. Delaware Trust Company*, 81 F.R.D. 448 (D.Del.1979); *EEOC v. Akron National Bank and Trust Co.*, 78 F.R.D. 684 (N.D.Ohio 1978); *EEOC v. Page Engineering Co.*, 17 E.P.D. ¶ 8603 (N.D.Ill.1978). Cases holding to the contrary include *EEOC v. Roxene Polymers Co.*, 10 F.E.P. 61 (W.D.Tex.1975); *EEOC v. Lutheran Hospital*, 10 F.E.P. 1177 (E.D.Mo. 1974); *EEOC v. CTS of Asheville, Inc.*, 13 F.E.P. 852 (W.D.N.C.1976); *EEOC v. Pinkerton, Inc.*, 14 F.E.P. 1431 (W.D.Pa.1977); *EEOC v. Raymond Metal Products Co.*, 17 F.E.P. 206 (D.Md.1978); *EEOC v. Schlueter Mfg. Co.*, 17 F.E.P. 53 (E.D.Mo.1978); *EEOC v. Whirlpool Corp.*, 80 F.R.D. 10 (N.D.Ind.1978); *EEOC v. Singer Controls of America*, 80 F.R.D. 76 (N.D.Ohio 1978); and *EEOC v. Vinnell-Dravo-Lockheed-Mannix*, 417 F.Supp. 575, 577 (E.D.Wash.1976), where the court concluded that "while the courts have steadfastly required private litigants to comply with Rule 23, compliance with that rule has not been required where an agency of the government sought class relief from discriminatory employment practices".

tion of public rights", which this court under different circumstances clearly recognized in *Occidental*. 535 F.2d at 542 n. 17.

Actions under § 706 and § 707

Under the present statute, the EEOC may bring civil actions against private employers under § 706, 42 U.S.C. § 2000e-5, or a pattern or practice suit under § 707, 42 U.S.C. § 2000e-6.[20] The Attorney General may bring an action under either section against a public employer.[21] Civil actions based on individual complaints may still be brought by the aggrieved party under § 706.

The report of the magistrate adopted by the district court noted that the Attorney General had not been required to comply with Rule 23 in a pattern and practice suit under § 707 and that there is nothing in the statute or legislative history to suggest a different requirement for the EEOC in a § 706 suit. Likewise the court concluded that it would be illogical to apply a different rule with respect to § 706 actions "in view of the seemingly identical nature of the two sections". Appellants argue (1) that compliance with Rule 23 was not addressed in any of the § 707 suits by the Attorney General, and (2) that a distinction continues to exist between § 706 and § 707 actions, since "§ 706 is concerned with rectifying individual cases of discrimination".[22] As Senator Williams stated, however, in the Senate debate, (n. 14, supra) there "will be no difference between the cases that the Attorney General can bring under section 707 . . . and those which the Commission will be able to bring" under its enforcement powers pursuant to § 706. An action by the EEOC under each section seeks to vindicate public rights.

20. Section 707, 42 U.S.C. § 2000e-6, reads in part:

> (c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission.

21. For further discussion of the effect of the 1972 Amendments and the President's Reorganization Plan No. 1 of 1978 issued pursuant thereto, see *United States v. Fresno Unified School District*, 592 F.2d 1088 (9 Cir. 1979).

22. In *Holmes* the court suggested that if, for any reason, EEOC is not certified under Rule 23 but still believes a pattern or practice of discrimination exists "its recourse is to file a suit under § 707". 556 F.2d at 792 n. 8.

The Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)[23] discusses similarities and distinctions between § 706 and § 707 actions. The key distinctions are in the burden and nature of proof required. The Court there compared an individual's § 706 action with the Government's § 707 pattern and practice action. Referring to *Franks v. Bowman*, 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a § 706 action brought by individuals, the Court noted that the plaintiffs in *Franks* by *"demonstrating the existence"* of a discriminatory pattern and practice "had made out a prima facie case of discrimination against the individual class members", and that the burden then shifted to the employer to prove that individuals were not in fact victims of previous discrimination. 431 U.S. at 359, 97 S.Ct. at 1866.

[15, 16] When the Government, as in *Teamsters v. United States*, alleges a "systemwide pattern or practice of resistence to the full enjoyment of Title VII rights", the Government must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts". It must establish by a *preponderance of the evidence* that the discrimination was the *"company's standard operating procedure*—the regular rather than the unusual practice". 431 U.S. at 336, 97 S.Ct. at 1855.[24] (Emphasis added) With respect to seeking individual relief the Court said in part:

> When the Government seeks individual relief for the victims of discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief . . . As was true of the particular facts in *Franks*, and as typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer

23. At the time the suit was filed the Attorney General was authorized to sue to eliminate discriminatory pattern or practice of unlawful discrimination; the suit was filed pursuant to § 707(a), 42 U.S.C. § 2000e-6(a). In 1974 the EEOC was substituted for the United States. *Teamsters v. United States*, 431 U.S. at 328-329, n. 1, 97 S.Ct. 1843.

24. At the initial, "liability" stage the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employers discriminating policy. Its burden is to show that such a policy existed. 431 U.S. at 360, 97 S.Ct. 1843.

> has followed an employment policy of unlawful discrimination. . . . The Government need only show that an alleged individual discriminatee . . . was a potential victim of the proved discrimination. As in *Franks,* the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. . . . [T]herefore, every [class member] will be presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant . . . was not based on its policy of discrimination. *Id.* at 361-362, 97 S.Ct. at 1867-1868.

As noted *supra,* it is clear from the legislative history of the 1972 Amendments that Congress preferred an EEOC action to a private action under § 706, expressing the hope that in the future the private lawsuit would be the exception and not the rule. (See n. 10) The advantage of a § 706 class action brought by the EEOC is that it brings before the court the full range of an employer's employment practices which unlawfully discriminate against a class, not piecemeal adjudication of individual claims, and allows the court to consider a variety of factors in formulating the appropriate remedy. The class action device allows the court to see the full implication of recognizing rights or remedies and allows it to determine what outcome would best serve the policies underlying the cause of action. *Developments—Class Actions,* 89 Harv. L.R. 1318, 1353 (1976).

The Supreme Court in *Teamsters v. United States, supra,* recognizes the necessity of applying basic principles of equity in formulating remedies in Title VII cases, saying in part:

> In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." (citations omitted) Especially when immediate implementation of an equitable remedy threatens to impinge upon the expecta-

> tions of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests", in order to determine the "special blend of what is necessary, what is fair, and what is workable". (citation omitted) 431 U.S. at 375, 97 S.Ct. at 1874-1975.

The Court lists a number of relevant factors which a trial court should consider in establishing its equitable order, including the number of identifiable victims, consequent extent of necessary relief, number of non-victim employees, the viable alternatives, and the economic circumstances of the industry. *Id.* at 376 and 376 n. 62, 97 S.Ct. 1843.

[17] While there may be differences in the nature and burden of proof in EEOC actions under § 706 and pattern and practice suits under § 707, an action under either section seeks to vindicate public policy. Likewise individual relief may be granted under either action for victims of discriminatory practices. We see no reason why a distinction should be drawn between § 706 and § 707 actions with respect to the applicability of Rule 23.

Rule 23 Certification

[18] It is clear that a compliance with Rule 23 is not expressly mandated by either the Rule itself or the 1972 Amendments authorizing the EEOC to bring a civil suit under § 706. Congress has made the determination that the EEOC is a "properly suing party" and an adequate representative of victims of employment discrimination. The Rule 23(a) certification requirement has been satisfied.

[19] In our opinion the other procedures of Rule 23 applicable to a private litigant in a § 706 class action are available to the courts in an EEOC action under the broad equitable powers vested in the courts in § 706(g), 42 U.S.C. § 2000e-5(g),[25] and recognized in *Teamsters v.*

25. As the Court stated in *Franks v. Bowman Transportation Co., supra,* "Congress in § 706(g) vested broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.' The legislative history supporting the 1972 amendments of § 706(g) of Title VII affirms the breadth of this discretion. 'The provisions of [§ 706(g)] are intended to give the courts wide

Footnote 25 continued on page A-22

United States, supra, and other cases. (See discussion under Equitable Powers, *infra*).

[20] If the private litigant satisfies the prerequisites of Rule 23(a), the Court then must determine whether the suit is maintainable as a class action under one of the subsections of Rule 23(b). Section 706 suits are generally found to be maintainable under Rule 23(b)(2).[26] See *Developments—Class Actions,* 89 Harv.L.R. at 1349. In fact, a civil rights action where a party is charged with discriminating unlawfully against a class is used as an illustration of a Rule 23(b)(2) class action in the Advisory Committee's Notes to the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).[27] Even if the suit contains a request for back pay the case continues to be properly certifiable under Rule 23(b)(2). *Franks v. Bowman Transportation Co, supra,* 424 U.S. at 751, 755, 96 S.Ct. 1251; *Elliott v. Weinberger,* 564 F.2d 1219, 1228 (9 Cir. 1977) *cert. granted* .... U.S. ...., 99 S.Ct. 75, 58 L.Ed.2d 106 (1978); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 251 (3 Cir. 1975), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

[21, 22] Rule 23(c) directs certain procedural protections in a class action depending upon the Rule 23(b) subsection under which the court certifies the action. When an action is certified under Rule 23(b)(2), as § 706 class actions by private litigants generally are, absent class members are not required to receive notice or to have the opportunity to opt-out of the suit. See *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 n. 14, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Souza v. Scalone,* 563 F.2d 385, 386 (9 Cir. 1977); *Elliott v. Weinberger,* 564 F.2d at 1228-29; *Wetzel v. Liberty Mutual Insurance Co.,* 509 F.2d at 248-49, 256.[28] Due process requires only that the class members be adequately represented. *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 691, 81 S.Ct. 1309, 6 L.Ed.2d 604; *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed.2d 22 (1940); *Gonzales v. Cassidy,* 474 F.2d 67, 74 (5 Cir. 973). The trial court may in its discretion in a class action certified under Rule 23(b)(2) direct that notice be given under Rule 23(d). *Souza v. Scalone,* 563 F.2d at 386; *Elliott v. Weinberger,* 564 F.2d at 1229.

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discretion exercising their equitable powers to fashion the most complete relief possible . . . ." 424 U.S. at 763-764, 96 S.Ct. at 1264. While § 706(g) does not refer specifically to procedural safeguards, the "broad equitable discretion" conferred on the trial courts would permit their consideration.

26. Rule 23(b)(2) provides:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (2) the party opposing the class had acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;
>
> . . . . .

27. See, *e. g., East Texas Motor Freight Systems, Inc. v. Rodriquez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), aff'g, 505 F.2d 40, 51 (1974); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 751, 755, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), which are both Rule 23(b)(2) class actions.

[23] Similar procedural safeguards are available in a class action brought by the EEOC even though it is not certified under Rule 23. The trial court need not require notice or allow absent members to opt-out when the EEOC sues, just as it is not required to do so under Rule 23 when a private litigant is the class representative. But the equitable powers of the trial court under Rule 23(d), which apply when a private litigant is the class representative, may be exercised under § 706(g) and the broad equitable powers recognized in Title VII actions.

By avoiding the Rule 23(a) certification decision, a step to which the private § 706 class representative is subject, the inevitable challenge to the EEOC as a class representative is avoided. The certification process would be time consuming and costly, and would serve no useful purpose in the final disposition of the case.[29]

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28. The view has been expressed that mandatory notice would be too inflexible a rule and would add little to a Rule 23(b)(2) class action. 3B Moore's Federal Practice, ¶ 23.55.

29. See Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co., supra* at 760. "(D)elays in the ultimate disposition of Title VII cases on the merits, increased motion practice, and further litigation are inevitable as a result of the Court's holding in *Holmes* while, on the other hand, no significant benefits can accrue as a result of Commission certification."

Equitable Powers

[24, 25] Broad equitable powers are vested in the federal courts under § 706(g), 42 U.S.C. § 2000e-5(g) of the Act. The courts are empowered to fashion such relief as the particular circumstances of the case may require. *Franks v. Bowman Transportation Co., supra,* 424 U.S. at 764, 96 S.Ct. 1251. Congress armed the courts with full equitable powers in Title VII cases. It is the historic purpose of equity to secure complete justice. The courts will be alert to adjust their remedies so as to grant the necessary relief. *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The courts "must 'look to the practical realities . . . involved in reconciling competing interests'" in determining the "special blend of what is necessary, what is fair, and what is workable". *Teamsters v. United States, supra,* 431 U.S. at 375, 97 S. Ct. at 1875.

[26] General Telephone is concerned that it may be subjected to subsequent suits on the same issues, possible double payment of damage awards, and inconsistent judicial decisions if the EEOC is not required to qualify as a class representative when it brings this type of action. The EEOC suggests that a district court might properly exercise its discretion to order the issuance of an appropriate notice which informs the charging party and members of the class of the pendency of the Commission's action and their statutory right to intervene. Alternatively, the EEOC suggests that the disrict court may condition receipt of relief on the waiver of an individual's personal right of action.

We agree with the EEOC that courts may fashion appropriate orders to insure that defendants are not subjected to double payment or unnecessarily duplicative litigation. Under their broad equitable powers the courts may prescribe procedures and remedies which are fair and equitable to all parties.

Conclusion

We affirm the order of the district court denying General Telephone's motion to dismiss the class action aspects of this suit.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al., *Defendant.*	CASE NO. C77-247M REPORT AND RECOMMENDATION

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
NOV. 11, 1977
EDGAR SCOFIELD, *Clerk*
By....., *Deputy*

I. *Introduction*

This is a sex discrimination suit brought by the Equal Employment Opportunity Commission against defendants General Telephone Company of the Northwest, Inc., West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers. The action arises under Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.*

On August 15, 1977, the matter was referred to the undersigned as Special Master pursuant to Rule 53, Federal Rules of Civil Procedure, 42 U.S.C. §2000(e) - 5(f)(5) and Local Magistrates' Rule MR 21. At a preliminary pretrial conference held on September 26, 1977, the parties indicated that before discovery could proceed further it was necessary for the court to consider and rule upon Defendants' Motion to Dismiss the "Class Action Aspects" of the Plaintiff's First Amended Complaint. Accordingly, that motion and Plaintiff's Motion to Compel Answers to Interrogatories were briefed and argued before the under-

signed on October 26, 1977. The undersigned has entered an order with respect to the plaintiff's motion to compel, a copy of which is attached hereto, and this Report and Recommendation relates to the remaining motion to dismiss the "Class Action Aspects" of EEOC's First Amended Complaint.

II. *Issue Before the Court*

The defendants moved to dismiss the "Class Action Aspects" of the complaint, arguing that the EEOC has failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure and Local Rule 23 by failing to plead all of the necessary class action allegations and further, by failing to move for certification within ninety days of the filing of the complaint. The EEOC argues that the provisions of Rule 23 are not applicable to actions brought by the EEOC, but that even if Rule 23 were applicable, the court should not dismiss, but should grant the EEOC leave to amend.

The basic issue before the court then, is whether the EEOC is required to comply with Rule 23 in order to bring suit on behalf of a class. Although there have been several district court decisions on the question, the only circuit court of appeals to address the question is the Fifth Circuit, which held that the EEOC is required to comply with Rule 23 in §706 (42 U.S.C. §2000(e) - 5) suits. *EEOC v. D. H. Holmes Co.*, 556 F. 2d 787 (5th Cir. 1977). The court found nothing in the Civil Rights Act or in Rule 23 to specifically exempt the EEOC from compliance, and so concluded that the rule should apply to the Commission.

The *Holmes* decision is contrary to the decisions of most district courts, including Judge Neill's decision in *EEOC v. Vinnell-Dravo-Lockheed-Manning*, 417 F. Supp. 575 (E.D. Wash. 1976). In that case, Judge Neill concluded that "while the courts have steadfastly required private litigants to comply with Rule 23, compliance with that Rule has not been required in cases where an agency of the government sought class relief from discriminatory employment practices." Se also *EEOC v. Pinkertons, Inc.*, 14 FEP 1431 (W.D. Pa. 1977); *EEOC v. CTS of Asheville, Inc.*, 13 FEP 852 (W.D. N.C. 1976); *EEOC v. Rexene Polymers*, 9 EPD 9922 (W.D. Tex. 1975); *EEOC v. Luth-*

eran Hospital, 7 EPD 9205 (E.D. Mo. 1974); *EEOC v. Mobil Oil*, 362 F. Supp. 786 (W.D. Mo. 1973).

None of the foregoing decisions are binding on this court, however, and the court is free to examine the question as a matter of first impression.

III. *Summary of Conclusion*

I recommend that this court conclude that the EEOC is not required to comply with Rule 23 in order to bring an action on behalf of a class, for the following reasons:

(1) The Commission is not required to comply with Rule 23 in §707 (42 U.S.C. §2000(e) - 6) "pattern and practice" suits, and suits under §706 (42 U.S.C. §2000(e) - 5) of the Act should not be treated differently;

(2) The statute itself provides the necessary authority for the EEOC to bring suit on behalf of a class; and,

(3) It is both undesirable and impractical to require the EEOC to comply with Rule 23.

IV. *Analysis*

(1) *Comparison with §707 Pattern and Practice Suits.*

Under the original Civil Rights Act of 1964, §706 of Title VII gave individuals the right to bring employment discrimination suits on behalf of themselves or a class. §707 gave the Attorney General the authority to bring "pattern and practice" suits against employers where discrimination consisted of more than isolated incidents. The authority of the EEOC in either case was limited to investigation and conciliation.

In 1972, dissatisfied with the progress made in eradicating employment discrimination, Congress amended the statute to allow the EEOC to sue on behalf of individuals (§706) and to bring pattern and practice suits (§707). The EEOC replaced the Attorney General as the plaintiff in §707 suits.

The result of the 1972 amendments was to make the two sections effectively the same in relation to the enforcement power of the EEOC. Today, the EEOC may bring suit under either §706 or §707, and may seek both

injunctive relief and affirmative relief in the form of back pay and retroactive seniority. See *U. S. v. Georgia Power*, 474 F. 2d 906 (5th Cir. 1973); *U. S. v. Allegheny-Ludlum*, 517 F. 2d 826 (5th Cir. 1975).

Both parties in the case at bar agree that there is no longer any essential difference between §706 and §707 suits brought by the EOC and that the applicability of Rule 23 should be the same under either section. If the EEOC is required to comply with Rule 23 under §706, it should also be required to comply under §707. This notion is supported by the legislative history. While debating the issue of whether to transfer §707 authority to the EEOC, Senator Harrison Williams, floor manager of the 1972 amendments, remarked:

> "There will be no difference between the cases that the Attorney General can bring under §707 as a 'pattern and practice' charge and those which the Commission may bring as a result of yesterday's decision to give the EEOC court enforcement powers. Frankly, the pattern and practice section becomes a redundancy in the law." 118 *Cong. Record*, p. 4081, February 16, 1972.

Senator Javits agreed by saying that "the EEOC . . . has the authority to institute exactly the same actions that the Department of Justice does under pattern and practice." 118 *Cong. Record*, p. 4081-2, February 16, 1972.

Clearly, the Attorney General was never required to comply with Rule 23 in order to bring a pattern and practice suit. See *International Brotherhood of Teamsters v. U. S.*, ... U. S. ...., 97 S. Ct. 1843 (1977); *U. S. v. Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973); *U. S. v. Ironworkers, Local 86*, 443 F. 2d 544 (9th Cir. 1971). Defendants argue that the 1972 amendments changed the law to require compliance with Rule 23 when the EEOC was given "pattern and practice" authority. This contention has no support in the Legislation or in case law.

There is nothing in the statute to suggest that Congress intended Rule 23 to apply to the EEOC where it had not previously applied to the Attorney General. The 1972 amendments merely transferred the authority to bring

pattern and practice suits from the Attorney General to the EEOC. Absent express language in the statute, this court should not impose restrictions on the EEOC that were not imposed on the Attorney General. Furthermore, the legislative history appears to indicate that Congress had no intention of requiring the EEOC to comply with Rule 23 in "pattern and practice" suits. In the course of debate on the bill, Senator Javits also stated:

> "I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled Class Actions and which give the opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party." 118 *Cong. Record*, p. 4082, February 16, 1972.

I believe that the proper interpretation of that language is that Congress intended that the EEOC be permitted to bring "pattern and practice" suits, which are in effect class actions, without regard to Rule 23.

Decisional law, too, supports the notion that Rule 23 does not apply. In *Allegheny-Ludlum*, supra, the EEOC brought a pattern and practice suit without complying with Rule 23. In that case, the court recognized the distinction between government pattern and practice suits and private class actions: "It appears to us that [appellants'] real objective is to convert what began as a government pattern and practice suit into an eventual Rule 23 class action."

In the *Holmes* case, relied upon by the defendants, the court held that Rule 23 applied to the EEOC under §706, but it is interesting to note that in a footnote the court appeared to recognize that the Commission could refile the suit as a "pattern and practice" suit under §707, where it would not be required to comply with Rule 23. In view of the seemingly identical nature of the two sections, it would be anomalous to follow the *Holmes* decision.

(2) *Examination of the Statutory Authority.*

The Civil Rights Act, 42 U.S.C. §2000(e), *et seq.*, provides authority for the EEOC to bring civil suits whenever it has been unable to secure an acceptable conciliation agreement. The prerequisites for such a suit are clearly

set forth in the statute: a charge must be filed with the Commission within 180 days of the alleged act of discrimination; the charge must be served on the respondent within ten days of filing; the Commission must investigate the charge and make a finding of reasonable cause; and the Commission must attempt to resolve the matter through conciliation.

The Commission's authority derives solely from that statute. *EEOC v. Rexene Polymers,* 9 EPD 9922 (W.D. Tex. 1975). Nowhere in the statute is there any indication that the EEOC must meet any requirements in addition to those specified. Had Congress intended the Commission to be bound by Rule 23, the requirement should have been expressed in the statute. Congress saw fit to specifically require the EEOC to comply with the provisions of Rule 65 of the Federal Rules of Civil Procedure in connection with obtaining of temporary or preliminary injunction relief under §706(f)(2), but made no reference to compliance with Rule 23. The most reasonable conclusion to be drawn is that Congress did not intend to require the EEOC to comply with Rule 23.

(3) *Undesirability and Impracticality.*

The legislative history of the 1972 amendments reflects a desire on the part of Congress to strengthen the enforcement capability of the EEOC. The amendments grew out of Congressional dissatisfaction with the progress being made in eliminating employment discrimination.

> "... The persistence of discrimination and its detrimental effects requires a reaffirmation of our national policy of equal opportunity in employment. It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided to the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment." House Report No. 92-238, 1972 *U. S. Code Cong. and Admin. News,* 2139.

It seems unlikely that Congress would expand the enforcement power of the EEOC by giving it the right to sue, and then restrict it to the procedures available prior to the amendments. If the EEOC were bound by Rule 23, then its enforcement power would be no greater than that

of any individual, and the 1972 changes would be meaningless.

In *Holmes,* the Fifth Circuit suggested that Rule 23 would present no barrier to the EEOC, because, in the court's view, the Commission had standing to sue under Rule 23 and would be a representative "*par excellence.*" However, a review of the elements of Rule 23 demonstrates that, under present case law, the Commission would be effectively precluded from bringing any class suits at all.

Rule 23 provides that "one or more members of a class" may sue. Courts have consistently held that a representative plaintiff must be a member of the class he seeks to represent. *Sosna v. Iowa,* 419 U. S. 393 (1975); *Kuahulu v. Employers Insurance of Wausau,* 557 F. 2d 1334 (9th Cir. 1977); *DuPree v. U. S.,* 559 F. 2d 1151 (9th Cir. 1977). Clearly, the EEOC can never be a member of a class of employees who have been discriminated against.

Rule 23 also requires that the representative party fairly and adequately protect the interests of the class. This means that the interests of the representative must be co-extensive with the interests of the class, and the representative must demonstrate that there is no conflict of interest between himself and other class members. *DuPree v. U. S.,* 559 F. 2d 1151 (9th Cir. 1977); *Albertsons v. Amalgamated Sugar Company,* 503 F. 2d 459 (10th Cir. 1974). Using these standards, the EEOC would not be an adequate representative in most instances, since it has been consistently recognized that the EEOC and private litigants pursue different, and potentially conflicting, interests. *U. S. v. Allegheny-Ludlum,* 517 F. 2d 826 (5th Cir. 1975); *U. S. v. T.I.M.E. - D.C.,* 517 F. 2d 299 (5th Cir. 1975), rev'd on other grounds, ... U. S. ...., 97 S. Ct. 1843 (1977).

> "While the government may be willing to compromise in order to gain prompt, and perhaps nationwide relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution." *Rodriguez v. East Texas Motor Freight,* 505 F. 2d 40 (5th Cir. 1974), rev'd on other grounds.

The Commission is charged with bringing suit in order

to "vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address grievances of particular individuals." *U. S. v. Allegheny-Ludlum,* supra.

In recognition of these conflicting interests, courts have held that private individuals are not bound by judgments in suits brought by the EEOC. *EEOC v. Detroit Edison,* 515 F. 2d 301 (6th Cir. 1975); *U. S. v. Allegheny-Ludlum,* supra; *Williamson v. Bethlehem Steel Corporation,* 468 F. 2d 1201 (2d Cir. 1972). Under Rule 23, all class members are bound by the judgment. Rule 23(c).

It is clear that under these principles, the EEOC could not meet the requirements of Rule 23. Allowing the Commission to proceed under the rule, as *Holmes* suggests, would necessitate a significant departure from the present understanding of Rule 23. Therefore, if we require the EEOC to comply with Rule 23, we are left with two alternatives: either we allow the Commission to sue under Rule 23, thereby straining the interpretation of that Rule, or we significantly hinder the enforcement capability of the EEOC.

Neither alternative is satisfactory. The better rule is to allow the EEOC to bring suit without the encumbrance of Rule 23.

V. *Conclusion*

For the foregoing reasons, I recommend that the court deny the motion to dismiss the class aspects of the complaint. In the event that the court should decide to follow the *Holmes* decision and require EEOC compliance with Rule 23, the court should nevertheless deny the motion to dismiss and grant the EEOC ninety days in which to file an amended complaint and to otherwise comply with Federal Rules of Civil Procedure 23 and Local Rule 23.

A proposed form of Order accompanies this Report and Recommendation.

DATED this 11th day of November, 1977.

/s/ PHILIP K. SWEIGERT
Philip K. Sweigert
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al., *Defendants.*	CASE NO. C77-247M ORDER DENYING MOTION TO DISMISS CLASS ASPECTS OF THE COMPLAINT

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
DEC. 21 1977
JOE R. ROMANE, *Clerk*
By....., *Deputy*

The Court has reviewed Defendants' Motion to Dismiss the Class Aspects of the Complaint, the legal memoranda of both parties, the records and files in this case, and the Report and Recommendation of the United States Magistrate herein:

It is therefore ORDERED:

(1) Said Report and Recommendation is approved and adopted;

(2) Defendants' Motion to Dismiss the Class Aspects of the Complaint is DENIED; and,

(3) The Clerk of this Court is directed to furnish uncertified copies of this Order to counsel for both parties and to the United States Magistrate.

DATED this 21st day of November, 1977.

/s/ WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX D
PUBLIC HEALTH & WELFARE — CIVIL RIGHTS
Title 42 U.S.C.

§ 2000e-5. Enforcement provisions— Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the pro-

ceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Same; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever

is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government,

govermental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed,

in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prose-

cution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and

each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.